Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

COMMENTS OF AMERICA ONLINE, INC.

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INTRODUCTION

America Online, Inc. ("AOL"), by its attorneys, files these comments in the above-captioned rulemaking proceeding designed to examine all forms of regulated intercarrier compensation.[1] **AOL** recognizes that the FCC's review of carrier charging and compensation mechanisms is a challenging, complex undertaking and is only one component of the larger regulatory picture that affects related issues, including the availability of unbundled network elements ("UNEs") – especially special access and dedicated transport services – to competitive local exchange carriers ("CLECs"), universal service reform, and the Commission's continued oversight and assessment of price caps for large incumbent local exchange carriers ("ILECs"). AOL offers these comments to facilitate the Commission's review and to provide a non-carrier perspective on the implications of the FCC's proposals.

AOL supports the FCC's primary goals and urges that government action regarding carrier compensation mechanisms not run counter to or undermine market-driven incentives for technological innovation and network efficiency. Regardless of the ups and downs of the larger economic outlook, the United States is the world model for a robust, efficient, ubiquitous, and affordable telecommunications system. **As** such, the FCC should continue to be guided by principles of competition and economic efficiency.

As a threshold matter, the FCC should underscore that economic efficiency dictates that all carrier compensation and charges should be traffic-neutral, since carrier costs do not vary depending upon whether traffic is bound for Internet Service Providers ("ISPs") or any other recipient. The FCC should not single out ISP traffic in addressing carrier charging and compensation issues. Moreover, while the Commission may seek to take a measured approach

[1] See *In the Matter of Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, CC Docket Nos. 01-92, 99-68, 96-98, FCC 01-132 (rel. Apr. 27,2001) ("Notice").

to reform, it would be wholly counterproductive to its larger goals to segregate arbitrarily Internet-directed traffic.

Second, the FCC should reaffirm the importance of its local competition policies that allow competitive carriers to maximize interconnection opportunities, so as to encourage ubiquitous, affordable and efficient Internet access. Needlessly requiring CLEC interconnection at multiple points of interconnection or imposing unwarranted restrictions on the use of NXXs could raise consumers' costs, impede the ability of rural consumers to gain access to the Internet and frustrate local competition.

Finally, the FCC should be careful to ensure that its pricing rules regarding carrier compensation mechanisms do not interfere with market-based signals driving carriers to upgrade their network infrastructure. While the task is complex, the FCC must balance competing objectives: the ability of carriers to be flexible to upgrade and improve their networks, the need to transition from undue regulation as competition takes hold, and the need to foster opportunity for competitive services.

By considering and adopting a framework that encourages competition and capitalizes on the successes of existing FCC policies, the Commission can promote market-driven rates, ubiquitous service deployment, and innovation.

I. ECONOMIC EFFICIENCY DICTATES THAT ALL COMPENSATION AND CHARGES BE TRAFFIC-NEUTRAL SINCE CARRIER COSTS DO NOT VARY DEPENDING UPON WHETHER TRAFFIC IS ISP-BOUND OR NOT

Just as the FCC held in its Intercarrier Compensation Order on Remand that carrier costs do not vary based on the nature of traffic,[2] so too should the FCC continue to treat all traffic alike for purposes of intercarrier compensation and charging. In fact, the voluminous record

[2] ***In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of*** *1996;* ***Intercarrier Compensation for ISP-Bound Traffic,*** Order on Remand and Report and Order, CC Docket Nos. *99-68,* 96-98, FCC 01-131, ¶¶ 90-94 (rel. Apr. 27, 2001) ("Order on Remand").

developed in that proceeding failed to establish *any* legitimate cost differentials between delivering a voice call to a local end-user or a data call to an ISP. Given that the evidence overwhelmingly supports the conclusion that carriers' network cost characteristics are the same for all traffic, there is no sound economic or policy reason to distinguish for carrier compensation purposes between traffic going to the Internet or anywhere else.

Significantly, while the FCC acknowledges that today's access charges and reciprocal compensation charges are not in line, Commission policy is properly moving towards such symmetry, with rates premised on costs. For example, in adopting the CALLS plan, the Commission recognized that it was a reasonable step "to bring about cost-based rates, and remov[e] implicit subsidies'' to move "the marketplace closer to economically rational competition."[3] Indeed, in acknowledging that the target access rates are still not in line with economic costs, the Commission committed to re-examine the need to intervene to ensure rates are set at costs in light of the level of competition that emerges during the term of the CALLS plan.[4] In other words, the clear goal is an economically rational, coherent cost-based pricing regime for telecommunications traffic.

Moreover, imposition of a structure that would require separating ISP-bound traffic for differential treatment (with varying rates to be passed through to ISP customers) would create complex and unnecessary measurement issues. Even assuming that traffic destined for the Internet could be discerned by identifying ISP customers, which is not the direction the FCC should be moving because it is in effect "ISP Registration," there is a genuine practical issue about distinguishing traffic at a more granular level, as many carriers use a shared access

[3] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service,* **Sixth** Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249. Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd. 12962, ¶ 36 (2000) ("CALLS Order").

[4] CALLS Order, 15 FCC Rcd. at ¶ 178.

structure for ISPs based upon capacity rather than a dedicated structure. While it may be that all traffic on the shared network could be deemed "ISP-bound traffic," carriers would for the first time be required to track traffic according to particular ISPs – whether AOL, EarthLink or any other ISP – in order to "pass through" the relevant charges for such traffic to the respective ISP. Such a requirement introduces a level of complexity that the Internet has been able to avoid so far to the benefit of all Internet users. In contrast to Internet backbone traffic peering and related arrangements where the need to identify traffic with specificity has been generally avoided, the FCC would in effect be needlessly complicating Internet payment arrangements.[5]

Accordingly, if the FCC concludes, based upon the record it develops in this proceeding, that a new carrier compensation/charging regime would serve the public interest, it should so proceed. What it should not and cannot do, however, is arbitrarily single out Internet-bound traffic. In fact, to move in that direction would be a step backwards since both the FCC and the states are otherwise moving to derive uniform, economically-efficient rates based on costs, not distinctions driven solely by regulatory fiat. Not only would a policy singling out Internet traffic arbitrarily and needlessly complicate an already complex issue, such a step could also have negative consequences for Internet traffic and usage, interfering with economically efficient price signals generally and dampening demand.

II. LOCAL COMPETITION POLICIES THAT ALLOW COMPETITIVE CARRIERS TO MAXIMIZE ACCESS TO TODAY'S NETWORK TRANSMISSION CAPABILITIES WILL ENCOURAGE UBIQUITOUS INTERNET ACCESS

In the Notice, the FCC seeks comment on how its proposals might affect end-user Internet access prices and whether it should alter current rules regarding carrier interconnection

[5] See Michael Kende, "The Digital Handshake: Connecting Internet Backbones", OPP Working Paper No. 32,2000 FCC LEXIS 5115. See also, Notice, at ¶¶ 2, **127.**

points and related local competition policies.[6] AOL urges the Commission to be mindful of the current state of local competition and the continuing lack of feasible alternatives to ILEC transmission in many instances, especially to reach residential consumers. Today, to offer key components of an end-to-end transmission service to ISPs for dial-up traffic, CLECs must still often rely upon ILEC transport to ensure that there is affordable, reasonable access to all end-users. While market forces are beginning to drive all carriers to deploy competitive infrastructure, including transport to points closer to end-user consumers, ubiquitous and affordable Internet access still largely depends upon access to ILEC transmission capabilities.

For example, in assessing transport costs associated with CLECs' single point of interconnection ("POI"), the FCC should recognize that to provide superior service to ISPs (and other customers), CLECs often utilize ILEC transport UNEs when necessary to offer a reliable, ubiquitous end-to-end service. As such, the issue isn't really whether CLECs should pay for transport, which is already the case, but rather, as a practical matter, whether facilities will be available at competitive rate levels to CLECs.[7] Indeed, in today's environment, it would be anticompetitive and contrary to the statutory goals of local competition under the 1996 Act if the FCC were to require CLECs to interconnect at every local switch, regardless of market demand, rather than a single POI. Since the ILECs are often the only viable source of needed transport, including interoffice and end-office transport, such a regulatory change would effectively enable the ILECs to dictate competitors' rates.

Significantly, market forces are today beginning to create incentives for carriers to deploy transmission capacity beyond the floor established by FCC rules. Thus, although CLECs may be

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[6] Notice, at ¶¶ 64, 112-115.

[7] See e.g., Joint Petition of BellSouth, Verizon and SBC asking the FCC to remove high-capacity loops (defined by the ILECs as DS1 or higher) and dedicated transport from the list of mandatory UNEs under Section 251(c)(3) of the Act. *Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC* Docket No. 96-98, filed Apr. 5, 2001.

permitted to establish a single POI within a LATA, to assure specified quality of service levels, carriers will often provide ISPs with multiple interconnection points so that the ISP's end-users have more reliable, trouble-free service. For this reason, the FCC should reject as baseless ILEC arguments that they must carry increasing amounts of traffic without compensation unless the FCC changes existing rules to require interconnection at each end-office switch. **As** traffic increases, network congestion will cause customer dissatisfaction, which in turn will drive carriers to ensure that they have sufficient capacity to serve their customers. It is especially important for the FCC to ensure that competition can grow in this natural evolution rather than being driven out by restricted access and/or unreasonable rates for necessary transport to end offices serving residential consumers.

At the same time, the Commission must not ignore simple economics. There is no evidence that CLECs are not already bearing their costs. As such, if regulatory changes require CLECs to bear substantially greater transport costs to deliver the same services to ISPs they offer today, these rate increases will certainly pass to ISPs. In turn, ISPs will seek to recover cost increases through their rates to consumers. The FCC should not be asking how regulatory changes will cause ISPs to increase consumer prices – either through per-minute or flat rate increases' – but rather, what it can do to ensure that transmission rates for Internet access are consistent with sound economics. In fact, the FCC should understand that if it raises CLEC costs to offer services to ISPs, the Commission will constrain competition between CLECs and ILECs and ultimately, undermine transmission options for ISPs and consumers alike.

Similarly, in reviewing the use of "virtual NXXs," the FCC should be mindful of the role it plays in ensuring that geographically dispersed consumers have affordable Internet access. The FCC should affirmatively find that the use of virtual NXXs, whereby CLECs serving ISPs

[8] Notice, **at** ¶ 64.

afford end-user consumers the ability to dial a local telephone number for Internet access, serve important public policy interests. **As** the Commission itself just recently reiterated, it is a vital policy goal to see that consumers living in sparsely populated areas are not left behind.' Just as it is anticompetitive to require CLECs to interconnect in each local calling area, regardless of market demand, so too would a policy impeding the use of virtual NXXs, as incumbent carriers are the only carriers with ubiquitous facilities. In fact, were the FCC to require suddenly that each CLEC serving ISPs have facilities within the local calling area in order for end-users to be able to use a local NXX, it would disproportionately impact rural residential users, who would likely be required to pay communications surcharges for what were previously local calls. In effect, such a rule change would impose access charges on those consumers who are least able to avail themselves of competitive choices and reverse a successful policy of widespread, affordable Internet access for all Americans.

III. CARRIER COMPENSATION MECHANISMS SHOULD NOT INTERFERE WITH MARKET-BASED CARRIER INCENTIVES TO UPGRADE NETWORK INFRASTRUCTURE AND INCREASE EFFICIENCY

In the Notice, the FCC is properly considering the impact of its proposed rules and policies on incentives for network build-out, infrastructure design and related infrastructure deployment.[9] AOL agrees that the FCC should be careful that its rules and policies do not undermine the incentives that naturally exist for incumbent carriers with legacy architectures to upgrade to newer, more efficient infrastructure. Specifically, the FCC should focus on subsidy-free rates and a cost mechanism that is forward-looking to encourage carriers to update their networks and enhance efficiency.

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[9] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Third Notice of Inquiry, CC Docket No. 98-146, FCC 01-223, ¶ 2, n. 4, (rel. **Aug.** 10, 2001).

[10] Notice, **at** ¶ 33.

Undoubtedly, such a result will require a balancing act. While carriers should be permitted to recover their costs through their rates, whether the rates are classified as "access charges" or "reciprocal compensation," these same rates should not in effect reward carriers for failing to move to more efficient networks. Rather, rate levels should encourage carriers to meet market-driven demand for efficiency and innovation. Rate levels, rate structure and cost assumptions should drive competitive and incumbent carriers to lower costs and move traffic to newer, better network architectures; if access rates and reciprocal compensation rates are set at levels that are too high, carriers may have a reduced incentive to upgrade.

For these reasons, the FCC's rules and state pricing assumptions are correct to encourage deployment of efficient network infrastructure. The FCC properly has stated that compensation should not be based on legacy costs." Likewise, many states use forward looking, long-run incremental pricing in establishing Section 251(b)(5) compensation rates.[12]

In the same way, the FCC should premise any revised framework in this proceeding on a thorough record regarding a broad range of cost inputs, while working with the states to correlate the relationship between compensation rates and charges and cost causation. Indeed, assumptions that were made even a few years ago about network costs and carrier rates may not hold true today. **As** carriers' costs become more transparent, market forces can work to bring prices down and drive demand.

Most importantly, even the limited evidence to date is that the bulk of network costs are generally not incurred on a per-minute of use basis and therefore, such a price structure –

[11] See e.g, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶¶ 673, 704-707 (1999) (**"Local** Competition Order") (subsequent history omitted).

[12] Local Competition Order, 11 FCC Rcd. at ¶ 632.

regardless of rate levels – is economically inefficient.[13] While today, **AOL** and other ISPs are charged for transmission services in a variety of ways, including usage sensitive, flat-rate and capacity-based pricing, rates for underlying transport should reflect the manner in which costs are incurred. Indeed, AOL's arrangements with CLECs reflect those carriers' cost inputs, including regulated ILEC charges; to the extent that these charges are reformed to move away from inefficient per-minute pricing, rates should come down, ultimately inuring to the benefit of end-users.

[13] See e.g., ***Ex Parte*** filing **of** America Online, Inc., CC Docket No. 99-68 **(Nov.** 30, 1999), Response to Ameritech's Internet Cost Analysis by Daniel Kelly, HAI Consulting, Inc.

CONCLUSION

The FCC's review of all forms of regulated intercarrier compensation is an ambitious and complex undertaking with the potential to change dramatically how charges for telecommunications services are levied. AOL urges the Commission in this endeavor to take the aforementioned steps to attain economic efficiency, adopt policies that promote and support the evolving competitive market, and encourage affordable and ubiquitous Internet access.

Respectfully submitted,

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Certificate of Service

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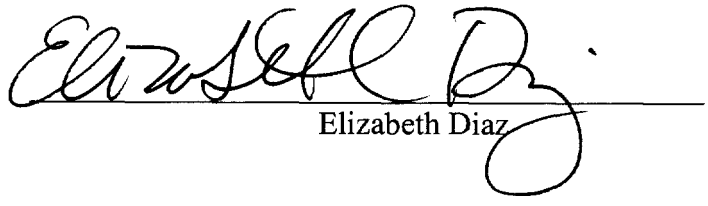

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